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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 597

ROBERT J. McKNETT, PETITIONER,

vs.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Robert J. McKnett respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Here involved is a discrimination against a plaintiff in a cause of action arising under the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59) in the declination of the State courts below to suffer the prosecution of such a suit where the defendant was a non-resident of Alabama owning and operating a railroad in the State both at the time of the accrual of the cause of action and the suit's commencement, and the cause of action arose in another State, although the jurisdiction of such State courts,

"as prescribed by local laws, is appropriate to the occasion," jurisdiction having been rejected solely because the cause of action arose under an act of the Congress.

In fine, in its construction of a State statute (Section 5681, Code of Alabama of 1923), providing that:

> "Whenever, either by common law or the statutes *of another state,* a cause of action, either upon contract or in tort, has arisen in such state against any person or corporation, such cause of action shall be enforcible in the courts of this state, in any county in which jurisdiction can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state,"

the State court of last resort has concluded that while the quoted statute required a determination of causes of action arising under the common law or statute *of any other State,* no such requirement existed as to suits arising under an act of the Congress, and therefore jurisdiction below was denied.

B.

Reasons Relied on for the Allowance of the Writ.

The State's highest court below has decided a Federal question of substance in a way, probably not in accord with the applicable decisions of this Court, in that though recognizing itself bound to entertain jurisdiction of all causes arising in other States against non-residents (thereby declaring its jurisdiction, as prescribed by local laws to be appropriate in such case) it has declined to extend such jurisdiction to suits under the Federal Employers' Liability Act (45 U. S. C. A. Sections 51-59), creating thereby an artificial discrimination against causes arising under an Act of Congress.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court, directed to the Supreme Court of Alabama, requiring that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 321, 6th Division, Robert J. McKnett, Appellant, vs. St. Louis & San Francisco Railway Company, a corporation, Appellee, and that the said judgment of the Supreme Court of Alabama be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will every pray.

ROBERT J. MCKNETT,
By WALTER BROWER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 597

ROBERT J. McKNETT, PETITIONER,

vs.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
A CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the Court below is reported in 149 So. 822, 227 Ala. —. Rendered by the Supreme Court of Alabama on June 9, 1933, it was extended in response to an application for rehearing, overruled on October 12, 1933 (R., p. 17).

The circuit court (where suit was filed) rendered the judgment appealed from without opinion.

II.

Jurisdiction.

1. Rendered on June 9, 1933, and as finally modified in response to application for rehearing, seasonably made,

the date of the judgment to be reviewed is October 12, 1933 (R., p. 8).

2. It is specifically claimed that the court below erred in affirming the judgment of the court, where suit was filed, in the overruling by the latter of demurrers to the respondent's plea in abatement. This ruling of the court of first instance will be found on page 6 of the Record. The opinion of the court below, affirming it, will be found on page 8, *et seq.*, of the Record.

3. The statutory provision under which such jurisdiction is invoked is Section 344 of Title 28, U. S. C. A. (Judicial Code, Section 237, as amended).

4. The cases believed to sustain the jurisdiction are:

Second Employers' Liability cases (*Mondou* v. *N. Y., N. H., & H. R. R. Co.*), 223 U. S. 1, 32 Sup. Ct. Rep. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

Douglas v. *N. Y., N. H., & H. R. R. Co.*, 279 U. S. 377, 73 L. Ed. 747, 49 Sup. Ct. Rep. 355.

III.

Statement of the Case.

Robert J. McKnett, your petitioner, filed his suit under the Federal Employers' Liability Act against the Respondent Railroad in the Circuit Court of the 10th Judicial Circuit of Alabama, claiming damages for certain severe physical injuries alleged to have been sustained by him in Memphis, Tennessee, while in the course of the performance and discharge of his duties as a trainman in the employ of the railroad (R., p. 1).

Both at the time McKnett was injured, and when suit was filed, the railroad was alleged to have been doing business in Jefferson County, Alabama (R., p. 3)—the place were the litigation was commenced.

Appearing specially, the railroad plead in abatement that McKnett's suit was not maintainable where commenced, in that the injury arose outside the state, and that it was a foreign corporation.

McKnett's demurrer to the plea in abatement was overruled (R., p. 6). He, thereupon, in consonance with the local practice, because of the adverse ruling of the court, took a non-suit (R., p. 6), appealing to the State Supreme Court (R., p. 6). That court affirmed the judgment of the court below on June 9, 1933 (R., p. 8), all the justices concurring. McKnett seasonably applied for a rehearing (R., p. 9). In an extended opinion (R., 9) it was overruled on October 12, 1933, two of the justices dissenting. Thus, in a final judgment, it was determined by the Alabama Court of last resort that no suit under the Act in question arising in another State could be maintained in Alabama where the defendant was a non-resident, although it did business where suit was commenced. This conclusion was reached despite a local statute (Code 5681) prescribing that whenever "by the common law or statute of another State a cause of action, either upon contract or in tort, has arisen in such other State * * * such cause of action shall be enforcible in the courts of this State * * *," which, in over ten decisions handed down by the court below prior to this suit's commencement, had been construed to overturn an earlier judicial policy of rejecting such jurisdiction, and require its entertainment.

For the first time since that statute's passage has the court below declined to accept this jurisdiction. That declination, as appears from the opinion, was solely because this suit arose not "under the common law or statutes of another *state*," but under an Act of the Congress, it being declared that the statute was therefore inapplicable.

IV.

The Specification of Errors.

1. The trial court erred in overruling McKnett's demurrer to the respondent's plea in abatement (R., p. 6), as did the court below in its approval thereof.

2. The trial court erred in determining that the present action, arising under an Act of the Congress, was not included in the statute opening the courts of Alabama to causes of action arising under the common law or statutes of other states, as did the court below in its approval thereof.

ARGUMENT.

POINT A. Where a particular State's courts are given no discretion to entertain suits against non-residents on foreign causes of action and are otherwise competent, such courts are under a duty to hear and determine such causes arising under the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59).

At the outset, it is proper to state that no contention has ever been made that the institution and maintenance of the suit was violative of the commerce clause. (*Michigan Central Railroad Company* v. *Mix et al.*, 278 U. S. 492, 73 L. Ed. 470, 49 Sup. Ct. Rep. 207; *Davis* v. *Farmers Co-op Co.*, 260 U. S. 321; *A., T. & S. F. Ry. Co.* v. *Wells et al.*, 265 U. S. 101.)

The respondent owns and operates over a considerable trackage at the place of the institution of the suit.

There is solely presented the construction of a State statute by the court below. We assert that the conclusion reached was erroneous because it was not in accord with the applicable decisions of this Court.

Preliminary to the argument, a brief résumé of the history of the treatment by the courts of Alabama of suits against non-residents on foreign causes of action is necessary.

In 1884, in *Central Railroad & Banking Company* v. *Carr*, 76 Ala. 388, it was determined by the Supreme Court of Alabama that a suit could not there be maintained by a Georgia resident on a cause of action there arising against a Georgia railroad, the latter maintaining trackage, etc., in Alabama. This rule was reapplied in many later cases, found in the foot-note below (1).

In 1907 (Gen. Acts Sp. Sess. 1907, p. 67) the statute later codified as Section 5681, Code 1923, was passed by the State's Legislature. It was construed in *National Council, Junior Order of W. A. M.* v. *Hill*, 208 Ala. 63, 93 So. 812. In that case, a Mrs. Hill, wife of one R. C. Hill, deceased, who, during his lifetime had resided with her in Tennessee, sued on a certificate of life insurance there issued by appellant society, incorporated in Pennsylvania. The society, duly qualified to do business in Alabama, appeared specially, averring its non-residence and the accrual of the cause in Tennessee. Demurrers to the plea were sustained. In affirming the trial court, it was said by the Supreme Court of Alabama:

(NOTE 1.) *Louisville & Nashville Railroad Company* v. *Dooley*, 78 Ala. 524; *Alabama Great Southern Railroad Company* v. *Chumley*, 92 Ala. 317; *Richmond & Danville Railroad Company* v. *Trousdale & Son*, 99 Ala. 394; *Louisville & Nashville Railroad Company* v. *Williams*, 113 Ala. 402; *Pullman Palace Car* v. *Harrison*, 122 Ala. 149, 25 So. 697; *Dozier Lumber Company* v. *Smith, etc., Lumber Company*, 145 Ala. 317, 30 So. 714; *Southern Railway Company* v. *Jordan*, 192 Ala. 528, 68 So. 418.

"In other words, if the defendant, though a foreign corporation, was at the time of the suit doing business in this state, * * * and service was properly had upon the Insurance Commissioner and * * * this being a transitory cause of action, it was suable in this state under the act of 1907, Special Session, p. 67 (*i. e.*, Code Section 5681, and cases cited). Therefore, the rule as declared in Pullman Palace Company *vs.* Harrison, 122 Ala. 149, 25 So. 155, 72 Am. St. Rep. 68, and the Carr case, 76 Ala. 388, 52 Am. Rep. 339, there cited (*i. e.*, in these cases the court held that a foreign corporation was not here amenable to suit on a cause of action arising in a foreign jurisdiction) *has been changed*, and the trial court did not err in sustaining the demurrer to plea two or in declining to quash the service of process." (Italics supplied.)

Settled by the *Hill case, supra*, it has been reaffirmed in at least ten later decisions. (See foot note 2.)

In *Jefferson Island Salt Company* v. *E. J. Longyear Company*, 210 Ala. 352, 98 So. 119, it was declared by the Supreme Court of Alabama:

"Prior to the act of 1907, the courts of this state had no jurisdiction to try causes between foreign corporations when the cause of action arose outside of the

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(NOTE 2.) Cf. *Dawson* v. *Dawson*, 224 Ala. 13, 138 So. 414; *Mobley, Supt. of Banks of Ga.* v. *Smith*, 224 Ala. 45, 138 So. 550; *Dollahite-Levy Co.* v. *Overton*, 223 Ala. 12, 133 So. 903; *Singleton* v. *Hope Eng. Co.*, 223 Ala. 538, 137 So. 441; *Continental Auto Ins. Underwriters* v. *Menuskin*, 222 Ala. 370, 132 So. 883; *Hall et al.* v. *Milligan*, 221 Ala. 233, 128 So. 438; Cf. *Weir* v. *Bro. Ry. Trainmen*, 221 Ala. 494, 129 So. 267; *Jefferson Island Salt Co.* v. *E. J. Longyear Co.*, 210 Ala. 352, 98 So. 119; *National Council, Junior Order, etc.* v. *Hill*, 208 Ala. 63, 93 So. 812; Cf. *Weaver* v. *Ala. Great Southern R. Co.*, 200 Ala. 432, 76 So. 364; *Southern Ry. Co.* v. *Jordan*, 192 Ala. 528, 68 So. 418.

> State. * * * Hence the Legislature * * * enacted the following (setting out the statute).
>
> Why the Legislature desired to burden the courts of this state with settling controversies between outsiders and which arose in other states is difficult to appreciate, but is, of course, a question of legislative policy with which the courts must not be concerned. Said act, however, must be so construed as to make it harmonize with the 'due process' clause of the federal Constitution when such can be done without doing violence to the legislative intent, *and must therefore be held to mean that suits can be maintained in the courts of this state by non-residents and personal judgments obtained upon causes of action arising out of this state, if legal service can be had on the defendant.*" (Italics supplied.)

It would, therefore, certainly appear that whatever had theretofore been the rule, since the passage of the statute it has become the judicial policy (in the adherence to which no discretion is permitted to enter) of Alabama that her courts are open for the hearing and determination of such causes.

In the case at bar, it was sought to effect a departure from that policy because here the cause arose not "under the common law or statute of *any state*" but under a legislative enactment of the Congress.

Any such departure is in contrariety to the decisions of this State. *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. Rep. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (*Second Employers' Liability Cases*).

In fine, it has been declared that in Alabama the original jurisdiction of her courts "as prescribed by local laws, is appropriate to the occasion" of hearing foreign controversies against non-residents. This is such a controversy. Excluding it because of its congressional statutory derivation will not be sanctioned.

This is not such a case as *Douglas* v. *N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377, 73 L. Ed., 747; 49 Sup. Ct. Rep. 355. There, as was clearly pointed out, the courts of New York had a discretion. Here there is none. Succinctly stated by Judge Pound of the Court of Appeals of New York, in *Murnan* v. *Wabash Railroad Company*, 246 N. Y. 244, 158 N. E. 508 (1927), the distinction is that:

> "The Appellate Division held that the Federal Employers' Liability Act which conferred, or recognized, concurrent jurisdiction in the state courts, made it mandatory upon the state court not to refuse to exercise its jurisdiction, when it had such jurisdiction, in any case brought under the act. It relied on the case of *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 32 St. Ct. 169, 56 L. ed., 327, 38 L. R. A. (N. S.) 44. The case is authority for the bare proposition that, where the state courts would exercise their jurisdiction except for the fact that the action is brought under the act of Congress, they may not refuse to exercise jurisdiction because the action is brought under the laws of the United States. The Court said:
>
> "'The existence of the jurisdiction creates an implication of duty to exercise it. * * * We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.' (Page 58, 32 S. Ct. 178.)
>
> "This general language read in connection with what was actually decided means nothing more than that the state courts must make no hostile discrimination against litigants who come within the act in question; that they must treat litigants under the federal act as other litigants are treated; *that they are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress.*" (Italics supplied.)

Other pertinent decisions will be found below (footnote 3).

Indeed in its construction of the statute the court below erred because while passed by the Congress, the Federal Employers' Liability Act was a statute of Tennessee (the place of the injury), (*Claflin* v. *Hausman*, 93 U. S. 136, 23 L. ed., 833), for as pointed out by the dissenting opinion in the court below" * * * an enactment to which the State gives the force of law is a statute of that State though not originating in its legislature (citing) *Williams* v. *Bruffy*, 96 U. S. 176, 183, 24 L. ed., 716; *N. O. Water Works Co.* v. *La. Sugar Ref. Co.*, 125 U. S. 18, 3 L. ed., 607."

The legislative sagacity begetting the statute (Section 5681) is not here involved. (See 44 H. L. R. 41; 43 H. L. R. 1217, dissenting opinion of Stone, J., in *Boright's case, supra*, and opinion of Mr. Justice Brandeis in *Davis* v. *Farmers Co-op. etc., Co., supra*). Here a duty was imposed. However reluctant, immutable was to be the obedience to it (the very decisions render under it so attested). No discretion was yielded, now to follow and now reject its mandate (as in New York). An attempt to create one by a judicial evolvement of an artificial discrimination against causes under Federal legislative pronouncements (when all others are welcomed) will hardly be sanctioned.

(NOTE 3.) *Boright* v. *Chicago R. I. & P. R. Co.*, 230 N. W. (Minn. 1930) 457; *Taylor* v. *Southern R. Co.*, 259 Ill. App. 271, (reversed other grounds 350 Ill. 139, 182 N. E. 805); *Walton* v. *Pryor*, 276 Ill. 563; *Bright* v. *Wheelock et al. as Receivers of C. & A. R. R. Co.*, 20 S. W. (2) 684, (Md. Sup. Ct.) 66 A. L. R. 263.

Conclusion.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Alabama and finally reverse it.

WALTER BROWER,
Counsel for Petitioner.